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Editor's Note

Major Mike Corbin of the Restoration and Natural Resources branch of the Environmental Law Division (ELD) has transferred to the litigation branch. Major Corbin's replacement is Major Allison Polchek, who is coming to ELD after finishing the environmental law LLM program at the George Washington University. Major Polchek will be responsible for base realignment and closure (BRAC) actions and issues involving the National Environmental Policy Act (NEPA).

Clean Air Act - LTC Olmscheid

In a case that may have major implications on how the U.S. Environmental Protection Agency (USEPA) approves Title V programs, a court ordered the USEPA to give final approval to the state of Washington's Title V program. Western States Petroleum Association v. EPA, No. 95-70034, 1996 U.S. App. LEXIS 14612, (9th Cir. June 17, 1996). USEPA granted Washington's Title V program interim status and conditioned final approval on the repeal of the part of Washington's program that exempted "insignificant emission units" (IEUs) from any monitoring, reporting, and record-keeping requirements. USEPA had approved proposals similar to Washington's in at least eight other states.

This decision forces USEPA to ensure that its policies are consistently applied across the country or risk facing similar challenges from affected parties. In the past, the onerous task of approving or disapproving the Title V programs was delegated to the USEPA Regions. If USEPA has to ensure consistency among programs, it may slow down USEPA's approval process for all air programs. This case not only underscores the differences between state Title V programs, but USEPA's inconsistent treatment of Title V programs as well.

New Lead-Based Paint Abatement Regulations Proposed - Ms. Fedel

On 7 June 1996, the U.S. Department of Housing and Urban Development (HUD) issued a proposed rule for lead-based paint (LBP) abatement. Office of Lead-Based Paint Abatement and Poisoning Prevention; Requirements for Notification, Evaluation, and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance, 61 Fed. Reg. 29170 (1996) (proposed June 7, 1996).

The rule will consolidate LBP regulations from various HUD programs at a single Code of Federal Regulations location. The rule will address notification, evaluation, and reduction of LBP in all federally owned housing to be transferred outside of the Federal government. Those Environmental Law Specialists (ELSs) at installations that will be transfering housing units should be aware particularly of proposed Subpart C, Disposition of Residential Property Owned by a Federal Agency other than HUD. Proposed Part 37 sets forth the particular requirements for testing and abatement of LBP hazards.

HUD anticipates that a final LBP rule will be published by September 1996, and will become effective one year after the date of publication of the final rule. ELD will inform ELSs of the effective date of the regulations once it is determined.

Citizens for a Better Environment v. Union Oil, Co. - LTC Lewis

What follows is an illuminating example of when a penalty is not a penalty for purposes of blocking a citizen suit. Union Oil Company (UNOCAL) was involved in a dispute with the California Regional Water Quality Control Board, San Francisco, (the Board) regarding its National Pollution Discharge Elimination System (NPDES) permit limits. During the dispute, the Board issued more lenient interim limits on selenium until the final limits, to which UNOCAL objected, were issued. The parties reached a settlement ultimately that involved the issuance of a cease and desist order (CDO) directing that UNOCAL pay $780,000 and UNOCAL was relieved from meeting the final selenium limits until 1998.

Citizens for a Better Environment (CBE) filed suit pursuant to the citizen suit provisions of the Clean Water Act (CWA), 33 U.S.C. §1365 (1987), in Federal district court. UNOCAL lost a motion to dismiss and then filed an appeal on two grounds. First, UNOCAL argued that the suit was barred by §1319(g)(6)(iii), which makes §1365 inapplicable where a state has issued a final order, not subject to judicial review, and a penalty has been paid. UNOCAL's second argument was that the CDO, in effect, changed the permit limits to the interim standard. Citizens for a Better Environment v. Union Oil Co., 42 ERC 1737, No. 95-15139, 1996 U.S. App. LEXIS 17437 (9th Cir. 1996).

Regarding the $780,000 payment, the court held that it was not a penalty but a settlement. The court relied upon the wording of the CDO, which described the sum not as a penalty, but as a "payment." Additionally, the court noted that the CDO was not issued under the authority for CDOs, nor under the authority to impose a civil penalty. CBE pointed out that UNOCAL sought to have the sum described as a payment and not a penalty for publicity reasons. CBE argued also that the payment did not adhere to the formal procedures required to assess a fine, and therefore imposed a benefit on UNOCAL in that the economic benefit of non-compliance that it may have realized was never scrutinized. The district court had held that the section of the California Clean Water Act, under which the CDO was issued, was not comparable to the section on imposing civil penalties. The Ninth Circuit agreed with the district court's determinations, and expressly declined to apply a contrary holding regarding comparability from the First Circuit decision in North and South Rivers Watershed Ass'n v. Scituate, 949 F.2d 552, 555-556 (1st Cir. 1991).

The UNOCAL case is important in that how one chooses to characterize the settlement of a dispute with a regulatory agency can have unforeseen impacts. While it appears that UNOCAL knew what was being negotiated, one can see where a word change here or a phrase change there might have acted to both bar a citizen suit and cause UNOCAL to escape application of the penalty policy.

DID YOU KNOW. . . ? THE EARTH SUPPORTS 30 MILLION SPECIES.

Administrative Stay of Used Oil Regulatory Provisions - MAJ Anderson-Lloyd

On 30 October 1995, the U.S. Environmental Protection Agency (USEPA) announced an administrative stay of certain provisions of the Used Oil Management Standards, pending issuance of a rulemaking to amend the standards. Standards for the Management of Used Oil, 40 C.F.R. Part 279 (1995).

The standards, originally issued in September 1992, allowed mixtures of used oil and characteristic hazardous waste to be managed as used oil if the hazardous characteristic was removed.
In accordance with these standards, the decharacterized mixture was subject to the land disposal restrictions of Part 279 and not as hazardous waste under the definition of hazardous waste,
40 C.F.R. 261.3 (1995). Therefore, the land disposal restrictions of Part 268, disposal prohibitions for characteristic waste, did not apply to disposal of the decharacterized mixture.

Only two weeks after the used oil standards were promulgated, the U.S. Court of Appeals for the District of Columbia invalidated dilution of characteristic hazardous waste as a form of treatment. Chemical Waste Management, Inc. v. EPA, 976 F.2d (D.C. Cir. 1992), cert. denied, 113 S.Ct. 1961 (1993). Citing Chemical Waste Management, Safety Kleen Corporation challenged the used oil management standards as violative of the statutory land disposal requirements of the Resource Conservation and Recovery Act. Safety Kleen asserted that the used oil rules allowed wastes that were decharacterized by their mixture with used oil to be land disposed despite the presence of hazardous constituents. The stay of the mixture provisions of §279.10(b)(2) is in recognition of the necessity to modify the used oil mixture rules to comply with the Chemical Waste Management decision.

The remainder of the used oil regulations will be effective. The stay of §279.10(b)(2) means that land disposal regulations will apply to mixtures of used oil and characteristic hazardous waste even if the characteristic is no longer exhibited. The practical effect of the stay is that mixing will be discouraged and the USEPA believes that the segregated waste streams will be more likely to be recycled.

New Developments in Natural Resource Damages - Ms. Fedel

On 7 May 1996, the Department of Interior (DOI) published a final rule to amend the regulations for assessing natural resource damages (NRDs) pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). Natural Resource Damage Assessments--Type A Procedures, 61 Fed. Reg. 20,560 (May 7, 1996). This final rule only affects the Type A Regulations, which were promulgated separately from the Type B Regulations. Both the Type A and Type B Regulations have been judicially challenged and subsequently revised by DOI.

DOI issued its original Type A regulations on 20 March 1987. The Type A procedures are a standard methodology for assessments that require minimum field observation in cases of minor discharges or releases in coastal and marine environments and the Great Lakes environments.
The final rule, published on 7 May 1996, amends the Type A procedures to reflect two decisions by the U.S. Court of Appeals for the District of Columbia issued on 14 July 1989. ***See*** State of Ohio v. U.S. Department of the Interior, 880 F.2d 432 (D.C. Cir. 1989), and State of Colorado v. U.S. Department of the Interior, 880 F.2d 481 (D.C. Cir. 1989).

DOI published its original Type B regulations on 1 August 1986. The Type B procedures are "alternative protocols for conducting assessments in individual cases." CERCLA, 42 U.S.C. §9651(c)(2)(B) (1986). The U.S. Court of Appeals for the District of Columbia invalidated portions of the Type B Regulations in the State of Ohio case cited above. In response to this decision, DOI published a revised regulation in 1994. Kennecott Utah Copper Corporation challenged the 1994 revisions to the Type B procedures, and the U.S. Court of Appeals for the District of Columbia issued a decision on 16 July 1996 that upheld some of the 1994 revisions while invalidating others. Kennecott Utah Copper Corporation v. U.S. Department of the Interior, No. 93-1700, 1996 U.S. App. LEXIS 17,418 (D.C. Cir. July 16, 1996).

The court rejected DOI's claim that the statute of limitations provided in CERCLA §9613(g)(1)
began to run when the revised regulations were promulgated in 1994, rather than the date that the original regulations were promulgated. This statute of limitations provision establishes that no action

may be brought following the later of (A) the date of discovery of the loss, or (B) the date on which regulations are promulgated under §9651(c).

The court held also that the challenge to DOI's interpretation of the term "services" for measuring the level of restoration of an injured resource, to include biological resources as well as human resources, was time-barred. The court did, however, invalidate the 1994 Regulations to the extent that they expand the concept of services from the 1986 Regulations to include measuring the physical and biological characteristics of the resource in addition to the resource itself. As stated by the court, "our invalidation of the `resources and services' provisions of the 1994 Regulations has the effect of reinstating the `services' approach under the 1986 Regulations." Kennecott, No. 93-1700, 1996 U.S. App. LEXIS 17,418, at *79 (D.C. Cir. July 16, 1996). The court upheld DOI's regulatory decisions on a series of other issues, including cost effectiveness, coordination between restoration remedies and response actions, and the acquisition of Federal lands. It is uncertain at this time whether DOI will again revise the Type B Regulations in a rulemaking procedure.

In a related matter, DOI has published an advance notice of proposed rulemaking to solicit comment on potential revisions to the Type B procedures to incorporate the National Oceanic and Atmospheric Administration's recently promulgated NRD assessment regulations for oil discharges. Natural Resource Damages Assessments--Type B Procedures, 61 Fed. Reg. 37,031 (1996).

DID YOU KNOW. . . ? EACH OF US BREATHES 21,000 QUARTS OF AIR EACH DAY.

Safe Drinking Water Act - CPT DeRoma

Congress has adjourned until Labor Day, but before doing so, it passed long-awaited amendments to the Safe Drinking Water Act (SDWA). President Clinton signed the amendments into law on 6 August 1996. A more in-depth review of the amendments will be provided next month, but here are some provisions of which all practitioners should be aware.

As expected, the amendments included a waiver of sovereign immunity that mirrors that of the Resource Conservation and Recovery Act. Consequently, Federal liability for violations of drinking water provisions now includes injunctive relief, civil and administrative fines and penalties, administrative orders, and reasonable service charges assessed in connection with permits, plans, inspections, or monitoring of drinking water facilities, as well as any other nondiscriminatory charges respecting the protection of wellhead areas or public water systems or underground injection. The 1996 amendments also broaden criminal liability under SDWA so that agents, employees, or officers of the United States may be prosecuted for any criminal sanction (including, but not limited to, any fine or imprisonment) under any Federal or state requirement.

Another addition was a change enabling the EPA to issue penalties against Federal agencies for violations of SDWA. These can range as high as $25,000 per day per violation, and, perhaps more importantly, citizens will be able to seek review of administrative penalty orders against Federal agencies and will also be able to sue to enforce whatever penalties may be imposed. Finally, the President was given the authority to waive compliance by a Federal agency of the executive branch if it is in the paramount interest of the United States to do so. The SDWA provisions that apply to Federal agencies are available as an attachment to message 97970 in the Environmental Law Forum on the Legal Automation Army-Wide System Bulletin Board System.

EPA Releases Fiscal Year 1995 Enforcement Report - CPT Anders

Debate begins over interpretation of the U.S. Environmental Protection Agency's (USEPA) long-awaited Enforcement Accomplishments Report for FY95 (Report). The Report, due 1 June 1996, was released by USEPA's Office of Enforcement and Compliance Assurance (OECA) the week of 5 August

1996. According to one source in the OECA, the delay was due in large part to USEPA efforts to resolve reporting policies and statistical discrepancies between divergent media and Regional offices. USEPA was faced with significant "bean counting" issues such as: how to count acts resulting in
violation of several statutes; when to implicate a parent company when one of its facilities receives a complaint; how to count a violation of one statute that is discovered during an inspection in another media; and, who is credited when EPA and a state conduct a joint inspection. This article examines some of the issues surfacing in the Report regarding USEPA's overall enforcement policies and strategy. Next month's Bulletin will analyze some of the conclusions suggested in the Report regarding the compliance posture of the regulated community.

The Report has been eagerly awaited by industry and environmental groups, as well as public officials on both sides of the political fence, seeking to defend or condemn the efficacy EPA's enforcement program. USEPA spokespersons hailed the Agency's successful enforcement efforts, citing the record number of criminal enforcement actions filed with the U.S. Department of Justice in FY95 as "reflecting EPA's stepped up targeting of the worst polluter and the most significant threats to the public health and the environment." ***USEPA Report, quoted in, Inside EPA,*** Vol. 17, No. 30 at p. 8 (July 26, 1996). USEPA referred 256 criminal enforcement cases to DOJ during FY95, up from 220 in FY94.

However, USEPA's FY95 enforcement numbers have dropped dramatically from FY94 in nearly every other category. The number of administrative penalties assessed by USEPA dropped from 1,476 to 1,105, compliance orders dropped from 2,016 to 1,864, inspections dropped from 7,526 to 7,309, and administrative civil referrals to DOJ plummeted from 430 to 214. Further, one source indicated that the criminal enforcement assets were left untouched by a 1990 agency reorganization effort, and in fact have increased in staff and resources. "The criminal program is basically a separate agency," the source says. "It runs by itself. The parts that EPA actually runs are falling apart." ***Id.***

Agency spokespersons assert that low numbers don't necessarily reflect inactivity; rather, they demonstrate USEPA's new enforcement strategy. According to USEPA Administrator Carol Browner, "we are in a different kind of enforcement mode than we were historically. It is no longer about how many cases are filed, it is about the quality of the cases . . . . the baseline should be: What were the reductions in air pollution achieved for these cases? What were the reductions in water pollution achieved for these cases? How many more people are in compliance today because of the Office of Enforcement & Compliance Assurance than were in compliance a year ago or two years ago?" ***Exclusive: Inside EPA Interview with EPA Administrator Carol Browner, Inside EPA,*** Vol. 17, No. 6 (February 9, 1996). But according to Bruce M. Diamond, a former USEPA enforcement official of 11 years, these professed visions of changed strategies do not affect the basic tenet that enforcers are only as good as their statistical booty. "There is an old and rather cynical expression among EPA enforcers that 'a bean is a bean is a bean'. . . . An EPA enforcement official who wants to look good and receive recognition, promotion, and other rewards has traditionally needed to make sure that enforcement targets are met. The resulting end-of-fiscal-year scramble to meet targets is not a pretty sight." ***Environmental Law Reporter, News and Analysis***, 26 ELR 10252, "Confessions of an Environmental Enforcer" (May 1996).

USEPA enforcement officials, including Enforcement Chief Steven Herman, blame the decreased numbers on a prolonged budget standoff and the Winter's resultant four-day government shutdown, as well as a Republican-slashed agency enforcement budget. ***Inside EPA*** (July 26, 1996) at p. 10. But one former USEPA enforcement official points out that, rather than a decrease in enforcement resources, the reorganization of previously disjointed sections into one consolidated office has consolidated resources as well, yielding a significant increase in the enforcement office budget. Reports such as these prompted Republican supporters to defend vigorously against denunciation of GOP budget cuts. Commerce Committee Chairman Thomas Bliley (R-VA) declared: "all this Fall, EPA Administrator Carol Browner claimed that Congress had taken EPA's enforcement cop off the beat, but now we learn that the cop was asleep at his post."